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No. _____

In The

Supreme Court of the United States

JOHN DISTELRATH, Chief of Police;
WEST COVINA POLICE DEPARTMENT;
JAMES E. STARBIRD, City Manager;
CITY OF WEST COVINA, A Municipal Corporation,

Petitioners,

v.

BILL HONEY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ninth Circuit erred in its interpretation of *Zinermon v. Burch*, 494 U.S. 113, 110 S. Ct. 975, 108 L. Ed. 2d 100 (1990) by holding that State post deprivation remedies do not satisfy the Due Process clause when a State actor intentionally deprives a citizen of a protected property interest in violation of established state law or regulations.

PARTIES TO THE PROCEEDING

All of the parties to this proceeding are listed in the caption.

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PETITION FOR WRIT OF CERTIORARI

Petitioners John Distelrath, West Covina Police Department, James E. Starbird, and City of West Covina respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 195 F.3d 531 (9th Cir. 1999) and reproduced in the Appendix at pages 1 through 8. The opinion and order of the United States District Court for the Central District of California (No. CV97-3655 RSWL (MCx)) is not reported and is reproduced in the Appendix at pages 9 through 11. The opinion and order of the Superior Court of the State of California for the County of Los Angeles is not reported and is reproduced in the Appendix at pages 12 through 14.

JURISDICTION

The Court of Appeals entered its judgment on November 9, 1999. This petition for writ of certiorari is timely filed in accordance with Rule 13.1 of the Rules of this Court. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment XIV, Section 1:

> . . . nor shall any State deprive any person of life, liberty, or property without due process of law

California Code of Civil Procedure § 1085 provided in 1996[1]:

> **Courts which may issue writ; parties to whom issued; purpose of writ**
>
> It may be issued by any court, except a municipal or justice court, to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station; or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board or person.

California Code of Civil Procedure § 1086:

> The writ must be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law. It must be issued upon the verified petition of the party beneficially interested.

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[1] California Code of Civil Procedure § 1085 has since been amended in a manner not relevant to the instant proceeding.

INTRODUCTION

Newspapers across the Country are filled with tales of rogue police officers with lengthy histories of aberrant behavior receiving lofty pensions in lieu of deserved terminations, or worse, retaining their jobs. Day after day stories appear of corrupt and dangerous officers who manage to retain their positions primarily out of their employer's inability to terminate them. There is a real fear that public entities are powerless to terminate the employment of these dangerous employees. Governments themselves are frequently paralyzed by the myth, if not the reality, of being forced to navigate the minefield known as procedural due process prior to disciplining and/or terminating a public employee.

Prior to the Ninth Circuit's decision in this case, public employers believed that if they failed to clear a particular procedural due process hurdle a worst case scenario involved the problem employee returning to his job with full back pay and benefits. As a result of the Ninth Circuit's decision in this case, in addition to the back pay and benefits, that employee is now also eligible to receive pain and suffering damages, punitive damages, and his attorneys' fees. The procedural due process minefield has become considerably more dangerous and the stakes for making a procedural due process violation have become exponentially higher. The dangerous police officer and the violent jailer now have an additional amount of job security and the problem that plagues so many communities has gotten worse.

Bill Honey was a jailer for the City of West Covina Police Department who was repeatedly accused of using

excessive force and mistreating women and minority prisoners. Because of these numerous accusations Petitioners sought to terminate his employment. However, Petitioners failed to follow the proper procedures for effecting the termination and as a result, shortly after his termination Respondent petitioned for a writ in state Superior Court compelling Petitioners to follow the proper state mandated procedures. Respondent prevailed on his writ and received reinstatement, full back pay, and benefits.

Not content with reinstatement, full back pay, and benefits, Respondent filed this Section 1983 action again alleging deprivation of the same procedural due process rights. Petitioners prevailed in the District Court on judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c). The District Court found that the post-deprivation process provided by the state – the writ of mandate proceeding – was adequate under the Due Process Clause and thus no colorable Section 1983 claim was stated. On appeal, the Ninth Circuit reversed. Petitioners now respectfully request that this Court grant their writ of certiorari to review the decision of the Ninth Circuit.

It is axiomatic that a procedural due process violation "is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process." *Zinermon v. Burch*, 494 U.S. 113, 126, 110 S. Ct. 975, 108 L. Ed. 2d 100 (1990). "Therefore, to determine whether a constitutional violation has occurred, it is necessary to ask what process the State provided, and whether it was constitutionally adequate." *Id.*

In *Parratt v. Taylor*, 451 U.S. 527, 101 S. Ct. 1908, 68 L. Ed. 2d 240 (1981), overruled on grounds not relevant

here by *Daniels v. Williams*, 474 U.S. 327, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986), this Court first announced the rule that the Due Process Clause could be satisfied, in certain circumstances, by postdeprivation state remedies. *Parratt* presented the circumstance of a prisoner who brought a Section 1983 action against state prison officials after they negligently lost hobby materials the prisoner had ordered through the mail. *Id.* at 529. The prisoner declined to pursue his opportunity to claim a due process violation through a state tort claims procedure. *Id.* at 543. In Federal court the prisoner asserted a procedural due process violation, arguing that the prison employees deprived him of his property without a hearing. *Id.* at 530. This Court affirmed summary judgment in favor of the defendants, finding that the prisoner had failed to allege a violation of the Due Process Clause of the Fourteenth Amendment. *Id.* at 543.

In so holding, this Court examined the conduct of the prison officials and found that the deprivation occurred "as a result of the *unauthorized failure of agents of the State to follow established state procedure.*" *Id.* (emphasis added). This Court recognized that "either the necessity of quick action by the State or *the impracticality of providing any meaningful predeprivation process,* when coupled with the availability of some meaningful means by which to assess the propriety of the State's action at some time after the initial taking, can satisfy the requirements of procedural due process." *Id.* at 539 (emphasis added). The holding was supported by the observation that the random and unauthorized nature of the deprivation made it difficult, if not impossible, for the state to hold a meaningful predeprivation hearing. *Id.* at 541.

Three years later, this Court further refined the *Parratt* doctrine in *Hudson v. Palmer*, 468 U.S. 517, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984). There, a federal inmate sued a correctional officer under Section 1983 alleging that the officer deprived him of property without due process of law when he intentionally destroyed personal belongings during a "shakedown search" of the prisoner's cell. *Id.* at 530. This Court found no due process violation, extending the rule of *Parratt* to cover random and unauthorized intentional conduct of state employees. *Id.* at 533. The reasoning was self-evident: the state "can no more anticipate and control in advance the random and unauthorized intentional conduct of its employees than it can anticipate similar negligent conduct." *Id.*

In *Zinermon*, this Court addressed the constitutionality of postdeprivation redress again. There, a Florida mental patient alleged a Section 1983 violation when staff members of the Florida State Hospital admitted him to the hospital under a "voluntary" statutory procedure when they should have known that he was not "competent" to sign the admissions forms required for the statutory admissions procedure. *Zinermon*, 494 U.S. at 119-21. This Court held that the facts presented did not fall within the category of cases contemplated by *Parratt* and *Hudson* and accordingly reversed the grant of a Rule 12(b)(6) motion in favor of the hospital staff. *Id.* at 136.

Three reasons animated this Court's decision not to apply *Parratt* and *Hudson*. First, the timing of Burch's deprivation was more predictable than in *Parratt* or *Hudson*. "[I]t is hardly unforeseeable that a person requesting treatment for mental illness might be incapable of informed consent." *Id.* at 136. Thus, "[a]ny erroneous

deprivation will occur, if at all, at a specific, predictable point in the admission process." *Id.* Second, this Court found that Florida could have provided meaningful pre-deprivation process and averted the deprivation suffered. *Id.* at 137-38. Third, this Court found that because "the State delegated to [the hospital staff] the power and authority to effect the very deprivation complained of here," their conduct could not be characterized as "unauthorized" in the same sense as the conduct in *Parratt* or *Hudson*. *Id.* at 138.

Purporting to apply this Court's precedent, the Ninth Circuit ruled in the instant case that postdeprivation due process was insufficient. *Honey v. Distelrath*, 195 F.3d 531 (9th Cir. 1998). In so doing, the Ninth Circuit announced a rule professing to follow *Zinermon*, but which instead holds for the first time that "even acts in violation of established law my be considered 'authorized.' " *Id.* at 534. Thus, even though the deprivation was admittedly carried out in contravention of state law and immediately remedied through postdeprivation remedies, the Ninth Circuit ruled that as a matter of law the deprivation was an authorized violation of established state procedures and that the proscriptions of *Parratt* and *Hudson* did not apply.

The Ninth Circuit's ruling effectively eliminates the procedural due process limitations imposed by *Parratt* and *Hudson* in favor of a rule that nearly **all** procedural due process violations are actionable under Section 1983. Where *Parratt*, *Hudson*, and *Zinermon* all stand for the proposition that state postdeprivation procedures can remedy unauthorized departures from state law, *Honey* now stands for the proposition that virtually **all** such

departures from state procedures are actionable under Section 1983. Procedural irregularities that occur when seeking to terminate or discipline a problem public employee have been suddenly transformed into pots of gold. Rather than simply being reinstated with full back pay and benefits, terminated employees are now also entitled to a free pass to federal court, as well as possible emotional distress and punitive damages, as well as attorneys' fees. The safe harbor of *Parratt* and *Hudson* has been vitiated by the Ninth Circuit and problem public employees on the verge of serious discipline and/or termination have now been given rights in the Ninth Circuit that are available almost nowhere else in the Country.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND.

A. Numerous Accusations of Violent and Racist Behavior Led to Petitioners' Decision to Terminate Respondent.

Respondent Bill Honey was a jailer employed by Petitioner City of West Covina ("City"). During his tenure at the West Covina jail, Respondent was accused of a variety of offensive acts, including mistreating minority prisoners, using choke holds on prisoners, grabbing female prisoners by the throat, and using inappropriate force on prisoners. As a result of these numerous accusations, on January 4, 1996, Petitioners notified Respondent that the City proposed to dismiss him from his job as a jailer, effective January 15. The proposal was based upon seven enumerated causes of action, including the use of

inappropriate force on and the mistreatment of prisoners. On January 16, Respondent met with Petitioner Distelrath and the City's Personnel Director for the purpose of engaging in a due process hearing as required by *Skelly v. State Personnel Board*, 15 Cal.3d 194, 124 Cal. Rptr. 14 (1975). At the hearing, Respondent requested to view all documents upon which his proposed termination was based. Petitioner Distelrath refused the request in violation of the West Covina Code, the Manual of the West Covina Police Department, California statutory law, the California and Federal Constitutions, and *Skelly*. One week later, an Order of Dismissal was entered by Petitioner Starbird, terminating Respondent's City employment.

B. Plaintiff Immediately Remedies The State Law Violations Through State Court Action.

Seven days after the Order issued, Respondent exercised his right to a speedy judicial review of his termination and petitioned the Superior Court for a Peremptory Writ of Mandamus under California Code of Civil Procedure section 1085. On February 9, 1996, only seventeen days after the Order of Dismissal was entered, the Superior Court issued an Alternative Writ of Mandamus and set a hearing for March 13. A Peremptory Writ was granted by the Superior Court, and Petitioners were ordered to comply with the relevant provisions of the West Covina Code, the Manual of the West Covina Police Department, the Law of the State of California and the United States, as well as the Constitutions of California and the United States. App., *infra*, p. 12. The Writ further

ordered Petitioners to reinstate Respondent to his employment and to pay Respondent all back wages and benefits, and to restore his seniority. App., *infra*, pp. 13-14.

Thus, following the Superior Court's issuance of the peremptory writ of mandate, Plaintiff was reinstated to his position as a jailer at the West Covina Police Department without any loss in pay or benefits. Despite receiving all the relief he requested in his writ proceeding, and an order requiring the Defendant to abide by all state procedural requirements, Plaintiff then filed this Section 1983 action based on the identical violation of his procedural due process rights.

II. PROCEDURAL BACKGROUND

Respondent filed the instant action on February 28 1997, seeking, among other things, damages under 42 U.S.C. § 1983. Petitioners removed the action to the United States District Court for the Central District of California. The District Court granted judgment on the pleadings (Fed.R.Civ.P 12(c)) in favor of Petitioners. App., *infra*, pp. 9-11. Respondent timely appealed from the judgment. On November 9, 1999, the Ninth Circuit Court of Appeals reversed the judgment of the District Court. App., *infra*, pp. 1-8. Petitioners now timely petition this Court for a Writ of Certiorari to review the decision of the Ninth Circuit Court of Appeals.

REASONS FOR GRANTING THE PETITION

Following contradictory paths in applying precedents of this Court, the Courts of Appeal have reached conflicting decisions as to the constitutional sufficiency of state post-deprivation remedies when a state actor violates a state employee's rights in violation of state law. If left unresolved, those conflicts will foster confusion among the circuits and the several states, imposing financial and administrative burdens on public employers and profoundly impacting the states' interest in quickly dismissing unsatisfactory employees.

I. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THE FIRST, SECOND, FIFTH, SEVENTH, AND ELEVENTH CIRCUITS AND WARRANTS REVIEW BY THIS COURT.

This Court's decision in *Zinermon*, while intended to sharpen the rule announced in *Parratt*, has nonetheless been the subject of at least two conflicting interpretations, one narrow and the other expansive. *See, e.g., Easter House v. Felder*, 910 F.2d 1387, 1409 (7th Cir. 1990) (Easterbrook, J., concurring) (noting that the Courts of Appeals have not found *Zinermon* easy to interpret). A plurality of the Circuits have followed the narrow interpretation that the *Zinermon* exception to *Parratt* applies only when the deprivation occurs at a predictable time and place and the state actor was directed by law to effect the deprivation. The Ninth Circuit's decision, harmonious with only one other circuit, follows the expansive view that the *Zinermon* exception applies when deprivations are marginally predictable. That is, *Zinermon* applies whenever it

is even remotely possible that the state could have created an additional safeguard that might have prevented the deprivation.

The Ninth Circuit has read *Zinermon* with an expansiveness beyond any other circuit, holding that actions in direct contravention of established state law are not random and unauthorized if they were intentional. Petitioners believe that the decision is out of sync with the precedent it purports to apply. More to the point under Rule 10 of the Rules of this Court, the decision below creates an irreconcilable conflict between the Ninth Circuit's expansive interpretation of *Zinermon* and the First, Second, Fifth, Seventh, and Eleventh Circuits' narrower view.

The First Circuit considered *Zinermon* in a case involving adverse employment action by the Chief Administrative Officer of the Rhode Island Board of Medical Licensure. *Lowe v. Scott*, 959 F.2d 323, 325-33 (1st Cir. 1992). In *Lowe*, the Court found that the acts of the Officer, while intentional, were random and unauthorized. *Id.* at 343. The Chief, while acting intentionally and cloaked in the state's authority, had only the authority to follow the established procedures – procedures which, if followed, would have provided adequate due process. *Id.* at 344. The First Circuit held that his resulting departures from those procedures, while intentional on his part, were random and unauthorized acts which the state could not have predicted, and thus *Zinermon* did not apply. *Id.* at 343-44.[2]

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[2] The First Circuit has followed the logic of *Lowe* many times. *See, e.g., Herwins v. City of Revere*, 163 F.3d 15, 17 (1st Cir.

The Second Circuit gives *Zinermon* a similarly narrow interpretation. *Katz v. Klehammer*, 902 F.2d 204 (2d Cir. 1990). In *Katz*, the plaintiff alleged that officials at the New York Department of Housing Preservation and Development violated his civil rights by mismanaging Dayton Towers. *Id.* at 206. The Second Circuit found that the plaintiff's allegations prohibited a finding that the conduct was foreseeable and thus not random or unauthorized. "[S]uch processes are not feasible in the instant case. The defendants here are alleged to have violated various laws and regulations concerning public housing, and a State rule directing persons in their position to hold a hearing before violating any rule or regulation would be senseless." *Id.* at 207, fn. 1.

Perhaps the most narrow construction of *Zinermon* was announced by the Fifth Circuit, which has viewed *Zinermon* as nothing more than a "wrinkle" on the *Parratt/Hudson* doctrine. *Caine v. Hardy*, 943 F.2d 1406, 1416 (5th Cir. 1991) (en banc). The facts of *Caine* are strikingly similar to the instant case. Caine suffered adverse employment action and claimed that at his hearing he was not furnished sufficient access to the relevant patient

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1998) (characterizing intentional deprivation as " 'random and unauthorized' conduct that the local government had no duty (and indeed no practical way) to forestall through a pre-deprivation hearing. . . . "); *Brown v. Hot, Sexy and Safer Productions, Inc.*, 68 F.3d 525, 536 (1st Cir. 1995) ("The plaintiffs contend that the deprivation cannot be characterized as 'random and unauthorized' because the performance was planned well in advance. . . . 'it would be absurd to suggest that the State hold a hearing to determine whether a [state official] should engage in such conduct.' ") (alteration in original) (quoting *Hudson*, 468 U.S. at 533).

charts. *Id.* at 1409. Caine claimed that the decision not to furnish the documents and to suspend him was the product of partisan decision making. *Id.* at 1413. The Court found the motivations of the actors irrelevant, given that the actions violated the hospital regulations. *Id.* at 1413 Thus, the Fifth Circuit found the *Zinermon* wrinkle inapplicable, holding that "it cannot be said that the decision-makers in this case were 'authorized' either to misuse the regulations or to discipline Dr. Caine for improper purposes." *Id.* at 1414; *see also Charbonnet v. Lee*, 951 F.2d 638 (5th Cir. 1992) (following *Caine* to deny Section 1983 claim where property seized by Sheriff contrary to Officer's written code of conduct).

The Seventh Circuit has interpreted *Zinermon* almost as narrowly as the Fifth Circuit. *See Easter House v. Felder*, 910 F.2d 1387 (7th Cir. 1990) (en banc). In *Easter House*, the plaintiff charged that various officials with the Illinois Department of Children and Family Services had illegally conspired to deprive it of its operating license and subject it to harassing investigations. *Id.* at 1390. Speaking to the precise issues decided by the Ninth Circuit, the Seventh Circuit found that where the acts contravene existing procedural safeguards, *Zinermon's* exception to the *Parratt/Hudson* doctrine was inapplicable:

> [W]e can envision a scenario where a high-ranking state official does exercise the authority and discretion to effect a deprivation, yet that discretion is 'circumscribed' by statutory or other pre-deprivation procedural safeguards. In such a scenario, an abuse of that discretion, while possibly causing a deprivation of property, would not necessarily be 'predictable' from the point of view of the state and, according to *Parratt* and

Zinermon, not compensable under § 1983. *Id.* at 1400.[3]

The Eleventh Circuit also espoused a narrow interpretation of *Zinermon* in *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994). There, as in the instant case, the plaintiff contended that he was dismissed in a manner contrary to state law. *Id.* at 1555. The Eleventh Circuit found that, coupled with the existence of an adequate state post-deprivation remedy, the fact that the Board dismissed the plaintiff contrary to existing state law was fatal to the complaint. *Id.* at 1563. "As any bias on the part of the Board was not sanctioned by the state and was the product of the intentional acts of the commissioners, under *Parratt*, only the state's refusal to provide a means to correct any error resulting from the bias would engender a procedural due process violation. *Id.*

The First, Second, Fifth, Seventh and Eleventh Circuits, in *Lowe*, *Katz*, *Caine*, *Easter House*, and *McKinney*, respectively, all faced scenarios nearly identical to the present case, and all espoused an interpretation of *Zinermon* that is directly contrary to the interpretation rendered by the Ninth Circuit in this case. All of these Circuits ruled that when a state actor violates state laws *Zinermon* **cannot** apply because "it cannot be said that the decisionmakers . . . were 'authorized' either to misuse the regulations or to discipline [the employee] for improper purposes." *Caine*, 943 F.2d at 1414. Both common sense

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[3] The Seventh Circuit recently reaffirmed this holding in *Nance v. Vieregge*, 147 F.3d 589, 591 (7th Cir. 1998) (citing *Easter House* and ruling that even if deprivation is spiteful, state postdeprivation remedy was sufficient for Due Process Clause).

and well over a half dozen Circuit court opinions stand for the unremarkable proposition that state actors cannot be authorized to violate state law, and thus if state law violations and a quick remedy are present *Zinermon* cannot apply.

II. THE NINTH CIRCUIT'S DECISION IS CONSISTENT ONLY WITH THE LAW OF THE FOURTH CIRCUIT.

Only the Fourth Circuit has determined to steer a course similar to the Ninth Circuit. In *Plumer v. State of Md.*, 915 F.2d 727 (4th Cir. 1990), the state motor vehicle authority revoked the plaintiff's driver's license in violation of state law. *Id.* at 929. The Fourth Circuit, reversing the District Court, found that "the risk of an erroneous license deprivation was clearly foreseeable." *Id.* at 931. Like the Ninth Circuit, the Fourth Circuit focused on the delegation of responsibility to enforce the procedural safeguards to the very employees who effected the deprivation. *Id.* Concluding, the Fourth Circuit held: "In short, when a state government can and does provide a predeprivation hearing and charges its employees with effecting the deprivation complained of, the availability of an adequate state postdeprivation remedy does not, standing alone, satisfy the Due Process Clause." *Id.*

III. THE NINTH CIRCUIT HAS AGGRAVATED A CONFLICT BETWEEN THE CIRCUITS RESPECTING THE GUARANTEES OF THE DUE PROCESS CLAUSE.

This conflict exacerbated by the Ninth Circuit's ruling is much more than a matter of scholarly debate. The interpretation of *Zinermon* affects the health and stability of governments – from local to state level – on a daily basis as they seek to rid themselves of unproductive or, in this case, dangerous and violent employees. It is crucial that this Court provide guidance now to the Courts of Appeal to either minimize the unnecessary burdens heaped upon governments in the Ninth and Fourth Circuits or to clarify the extent of the burden governments must bear in the remaining Federal Circuits.

Further, the guarantees of the Due Process Clause, and accordingly the interpretation of *Zinermon*, have implications far beyond the ambit of public employment. Scholars have recently suggested that the expansive reading of *Zinermon* could provide additional ammunition to private industry as it fights to enforce trademark rights against the several states. *See* Christina Bohannan & Thomas F. Cotter, *When The State Steals Ideas: Is The Abrogation Of State Sovereign Immunity From Federal Infringement Claims Constitutional In Light of Seminole Tribe?*, 4 Fordham L. Rev. 1435, 1488 (1999).

The reach of *Zinermon*, of course, spans the gamut of the bundle of rights. Principles as basic as access to the Federal Courts are defined by whether a private citizen

can maintain an action against the state. *See* Carlos Manuel Vazquez, *What Is Eleventh Amendment Immunity*, 106 Yale L.J. 1683, 1758-59 (1997).

Because the extent of the several states' exposure to liability for violation of the Due Process Clause is of paramount Federal importance, this Court should grant the petition so that it can resolve the conflict among the Courts of Appeals this Term.

CONCLUSION

For the reasons stated above, this Court should grant the petition for writ of certiorari.

Respectfully Submitted,

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APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BILL HONEY, *Plaintiff-Appellant,* v. JOHN DISTELRATH, Chief of Police; WEST COVINA POLICE DEPARTMENT; JAMES E. STARBIRD, City Manager; CITY OF WEST COVINA, a municipal corp., *Defendants-Appellees.*	No. 98-55219. D.C. No. CV 97-3655 OPINION

Appeal from the United States District Court
for the Central District of California
Ronald S. W. Lew, District Judge, Presiding

Argued and Submitted
Oct. 8, 1999 – Pasadena, California

Filed November 9, 1999

Before: Betty B. Fletcher, Dorothy W. Nelson, and Melvin Brunetti, Circuit Judges.

Opinion by Judge B. Fletcher

COUNSEL

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Jeffrey Wertheimer, Rutan & Tucker, Costa Mesa, California, for the defendants-appellees.

OPINION

B. FLETCHER, Circuit Judge:

Bill Honey appeals the Fed. R. Civ. Pro. 12(c) dismissal of his 42 U.S.C. § 1983 action alleging that he was denied procedural due process when he was fired from his position as a prison guard. The district court granted appellees' motion for judgment on the pleadings, holding that Honey received adequate due process in an earlier state court mandamus proceeding, and that his suit was therefore barred by *Parratt v. Taylor*, 451 U.S. 527 (1981), *overruled in part on other grounds by Daniels v. Williams*, 474 U.S. 327 (1986). We have jurisdiction pursuant to 28 U.S.C. § 1291. We reverse.

Factual Background and Procedural History

On January 4, 1996, the City of West Covina notified Appellant Bill Honey that it proposed to terminate his employment as a jailer in the West Covina Police Department because of accusations that he used excessive force and mistreated women and minority prisoners. During the hearing for the proposed termination, Honey and his counsel requested to view all documents upon which the City based its decision to terminate his employment. Appellee Distelrath, who was Chief of Police, refused this request, and Honey was terminated without ever seeing this documentation. Following the hearing, appellee City Manager James E. Starbird issued an order terminating

Honey's employment. The parties do not dispute that Honey was denied procedural due process in his termination. The key question in this case is whether the post-deprivation remedies that Honey received should bar this § 1983 suit.

Honey challenged his termination by filing for a writ of mandate from the California Superior Court in Los Angeles, alleging that his termination violated his right to procedural due process under the United States and California Constitutions. On June 19, 1996, the Superior Court granted the writ of mandate, and ordered Honey reinstated with back pay and full benefits.

Honey next challenged his termination by filing a government claim with the City of West Covina on July 12, claiming $10,000.00 in out of pocket expenses and requesting $1,000,000.00 in punitive damages. The City Counsel denied his claim on September 4, 1996.

On February 28, 1997, Honey filed this § 1983 action in the Los Angeles Superior Court. The appellees removed the action to federal district court, and sought judgment on the pleadings under Fed. R. Civ. P. 12(c), arguing that Honey's successful state mandamus action satisfies the requirement for procedural due process and precludes a § 1983 action under *Parratt v. Taylor.* In December 1997, the district court granted appellees' motion for judgment on the pleadings, but granted Honey 10 days leave to amend the pleadings on his Fair Labor Standards Act claim. After Honey did not file amended pleadings, the district court entered a final judgment for appellees. We reverse.

DISCUSSION

Judgment on the pleadings is proper when, taking all the allegations in the pleadings as true, the moving party is entitled to judgment as a matter of law. *Nelson v. City of Irvine,* 143 F.3d 1196, 1200 (9th Cir. 1998). This court reviews de novo a district court's judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c). *Id.*

Claim Preclusion

[1] Because the state proceeding was a mandamus action, the ordinary claim preclusion rules that bar parties from relitigating claims already decided by courts on the merits do not apply here. Under the rule in *Migra v. Warren City School Dist.,* 465 U.S. 75 (1984), a petitioner's state court judgment has the same claim preclusive effect in federal court that the judgment would have in the state courts. The rule in California state courts was set out in *Mata v. City of Los Angeles,* 20 Cal. App. 4th 141, 149 (Cal. 1993), in which the California supreme court held that a mandamus action is a "special proceeding" and does not bar a subsequent § 1983 action. Therefore, claim preclusion does not bar Honey's § 1983 action.

The Parratt rule

The parties' fundamental disagreement rests on whether *Parratt v. Taylor* bars Honey's § 1983 suit. We hold that it does not.

In *Parratt,* the petitioner was a prisoner who had ordered hobby materials through the mail. As a result of the "random and unauthorized" negligence of the prison

officials, the hobby materials were lost. Parratt brought a § 1983 action alleging that the prison officials had deprived him of property without due process of law. The Court held that where post-deprivation state tort remedies that would satisfy the Due Process Clause are available, relief under § 1983 is barred. *Parratt*, 451 U.S. at 544. *See also Hudson v. Palmer*, 468 U.S. 517 (1984) (extending the *Parratt* rule to intentional acts of state officials).

In *Zinermon v. Burch*, 494 U.S. 113 (1990), the Supreme Court created an exception to the *Parratt* doctrine to allow a former mental patient to file a § 1983 action against a mental hospital. In that case, the former patient alleged that the hospital administrators deprived him of liberty without due process of law by admitting him as a "voluntary" patient when they should have known he was incompetent to give consent. State law prohibited involuntary admission without due process, but did not provide for procedures to ensure that voluntary admissions were truly made voluntarily by competent individuals.

The Supreme Court held that *Zinermon* was not controlled by *Parratt* for three reasons: (1) the deprivation of liberty was predictable; (2) the creation of a pre-deprivation process was not impossible; and (3) the deprivation was the result of an official's "abuse of his position" and therefore was not "random and unauthorized." *Id.* at 136-138.

In *Armendariz v. Penman*, the Ninth Circuit applied the *Zinermon* exception where the city attorney, mayor, planning directors and other officials designed and implemented allegedly illegal sweeps of low-income

housing units. *Armendariz*, 31 F.3d 860 (9th Cir. 1994), *rev'd in part on other grounds* by *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996) (en banc). The *Armendariz* court held that even illegal acts could be considered "authorized" where the defendants were "those persons who are assigned the duty of interpreting and enforcing the housing and fire codes." *Id.* at 866. Thus, "[i]f plaintiff's allegations are true, it would have been reasonably foreseeable that the deprivation would occur since it was the intent of the defendants for it to occur." *Id.*

In the case at hand, the district court did not address whether the *Zinermon* exception applies. Appellees contend that it does not apply because the deprivation resulted from actions that were in violation of established law. Thus, the conduct was random and unauthorized, and a predeprivation remedy would have been impossible. They argue that the post-deprivation remedy that Honey received through the state mandate proceeding afforded him all the process that was due.

[2] However, as the *Armendariz* and *Zinermon* courts acknowledged, even acts in violation of established law may be considered "authorized." We hold that the acts at issue in this case were not random and unauthorized because the defendants in this case had the authority to effect the very deprivation complained of, and the duty to afford Honey procedural due process. Appellees Distelrath, the Chief of Police, and Starbird, the City Manager, were in positions with substantial discretionary powers. They were responsible for the procedurally deficient termination hearings, and thus the deprivation was foreseeable because it was their intent for it to occur. *See Armendariz*, 31 F.3d at 866. Thus, we find that this case fits

squarely within the *Zinermon/Armendariz* exception to the *Parratt* rule.

[3] Additionally, this circuit does not apply *Parratt* where a deprivation occurs because officials are acting according to established procedures – even if those established procedures violate other state or federal laws. *Piatt v. Mac Dougall*, 773 F.2d 1032 (9th Cir. 1985); *see also Haygood v. Younger*, 769 F.2d 1350, 1357 (9th Cir. 1985) *cert. denied* 478 U.S. 1020 (1986) (deprivation that is product of "institutionalized practice" is "neither random nor unauthorized," and thus *Parratt* does not apply) (citing *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 436 (1982)).

[4] In *Piatt*, a prisoner filed a § 1983 action alleging that he had not been paid for work that he had done while in prison. Arizona law entitled inmates to compensation for work, but as a matter of policy, prison officials refused to pay inmates. *Piatt*, 773 F.2d at 1035. The *Piatt* court held that the *Parratt* doctrine does not apply to bar § 1983 suits based on "deliberate, considered, planned, or prescribed conduct by state officials, whether or not such conduct is authorized." *Id.* at 1036.

[5] The superior court that granted Honey's writ of mandate found that when the appellees violated Honey's due process right they were "acting in accordance with the policies, practices and customs of Respondents' West Covina Police Department and the City of West Covina." In his complaint, Honey alleged that the appellees "have intentionally engaged in a pattern of violation of the constitutional and civil rights of city employees" including due process violations. Honey further demonstrates the deliberateness of appellees' actions by showing that

appellees refused his specific requests to review all the materials relied upon in his termination.

[6] Taken together, these allegations and findings demonstrate that the appellees may have acted in a "deliberate, considered, planned" manner that falls outside *Parratt*. Therefore, the district court erred when it entered judgment for appellees on the pleadings.

CONCLUSION

We REVERSE the district court and REMAND for further proceedings on appellant's § 1983 claim.

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

BILL HONEY, Plaintiff, vs. JOHN DISTELRATH, Chief of Police; WEST COVINA POLICE DEPARTMENT; JAMES E. STARBIRD, City Manager; CITY OF WEST COVINA, a municipal corporation; and DOES 1 to 25, inclusive, Defendants.	Case No. CV97-3655 RSWL(MCX) **[~~PROPOSED~~] ORDER GRANTING MOTION FOR JUDGMENT ON the PLEADINGS [FEDERAL RULE OF CIVIL PROCEDURE 12(C)] ON 42 U.S.C. § 1983 COMPLAINT AND DISMISSAL OF FAIR LABOR STANDARDS ACT COMPLAINT** DEC 3, 1997

Defendants John Distelrath, West Covina Police Department, James E. Starbird, and City of West Covina's ("Defendants") Motion for Judgment on the Pleadings came on for a regularly scheduled hearing before this Court on November 24, 1997. James Davis appeared on

behalf of Plaintiff, Bill Honey, and Jeffrey Wertheimer of Rutan & Tucker, appeared on behalf of Defendants.

Having considered the memoranda and arguments of the parties, the court finds that Plaintiff Bill Honey cannot sustain a claim under 42 United States Code Section 1983. Plaintiff's Complaint alleges that the termination of his employment constituted an unauthorized deprivation of his liberty and property interests committed without due process of law. However, because Plaintiff had available, and in fact sought, and was granted relief under a state court peremptory writ of mandate proceeding, Plaintiff had and received an adequate procedural redress for Defendants' termination of his employment. This adequate state remedy for random and unauthorized deprivations of liberty or property satisfies the requirements of procedural due process. *Parratt v. Taylor*, 451 U.S. 517, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981). Accordingly, IT IS HEREBY ORDERED that Defendants' Motion for Judgment on the Pleadings is GRANTED. Judgment should be entered in this action for Defendants and against Plaintiff with respect to the 42 U.S.C. Section 1983 claim for relief in Plaintiff's Complaint.

The court also finds that Plaintiff has not pleaded facts sufficient to sustain a claim for relief under the Federal Fair Labor Standards Act ("FLSA"). Therefore, his claim for relief for alleged violations of the FLSA is DISMISSED. Plaintiff has 10 days leave to amend to refile his FLSA claim.

IT IS SO ORDERED.

DATED: December 3, 1997

RONALD S. W. LEW
Hon. Ronald S. W. Lew
Judge, U.S. District Court

SUPERIOR COURT OF THE STATE OF CALIFORNIA
LOS ANGELES COUNTY

BILL HONEY, Plaintiff, vs. JOHN DISTELRATH, Chief of Police; WEST COVINA POLICE DEPARTMENT; JAMES E. STARBIRD, City Manager; CITY OF WEST COVINA, a municipal corporation; and DOES 1 to 25, inclusive, Defendants.	Case No: BS037655 PEREMPTORY WRIT OF MANDAMUS [C.C.P. §1087] JUDGE ROBERT H. O'BRIEN

TO JOHN DISTELRATH, Chief of Police, WEST COVINA POLICE DEPARTMENT; JAMES E. STARBIRD, City Manager; and CITY OF WEST COVINA:

YOU ARE HEREBY COMMANDED, IMMEDIATELY UPON RECEIPT OF THIS WRIT, TO:

1. Comply with the provisions of the West Covina Code, the Manual of the West Covina Police Department, the Personnel Rules of the City of West Covina, the Laws of the State of California and the United States, and the California and United States Constitutions;

2. Immediately reinstate Petitioner to his position as a Jailer with the Respondent West Covina Police Department;

3. Provide Petitioner with complete and unredacted copies of all of the materials described in the Alternative Writ of Mandamus which have not been provided to Petitioner or his counsel;

4. Delete Specific Cases for dismissal Nos. 1, 2, 3, 4 and 5, inclusive, and any and all references to them from the Notice of Dismissal and the Order of Dismissal;

5. Provide Petitioner with a meaningful opportunity to respond and rebut the remaining Specific Causes 6 and 7 against him, this opportunity to occur not less than 30 days from the date Petitioner has been reinstated and respondents have provided Petitioner with constitutionally adequate notice of what rules were allegedly violated in Specific Causes 6 and 7; and

6. Respondent City of West Covina is to pay Petitioner all back wages, benefits, including all vacation and sick time that Petitioner would have accrued, and allowances and restore his seniority for the period between the date of his dismissal, January 22, 1996, and the date of his reinstatement, inclusive.

IT IS FURTHER ORDERED that a copy of this Peremptory Writ of Mandamus shall be personally served on the Respondents by Petitioner. Respondents shall file and serve their return showing what actions they have taken in response to this Writ on or before August 30,

1996. This Court shall retain jurisdiction to enforce the terms of this Writ.

DATED: JUN 26 1996

JOHN A CLARKE, CLERK
/s/ Robert H. O'Brien
ROBERT H. O'BRIEN,
DEPUTY
JUDGE OF THE
SUPERIOR COURT

[LOGO]